United Nations A/71/280

General Assembly

Distr.: General
3 August 2016

Original: English

Seventy-first session
Item 69 (b) of the provisional agenda*
Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Human rights and international solidarity

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the report of the Independent Expert on human rights and international solidarity, Virginia Dandan, submitted in accordance with Human Rights Council resolution 26/6.

* A/71/150.

16-13407 (E) 190816

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Report of the Independent Expert on human rights and international solidarity

Summary

The present report is submitted to the General Assembly by the Independent Expert on human rights and international solidarity, Virginia Dandan, in accordance with Human Rights Council resolution 26/6. The previous report of the Independent Expert, submitted to the Human Rights Council at its thirty-second session, in June 2016 (A/HRC/32/43 and Corr.1), was a summary of what had transpired during the regional consultations on the proposed draft declaration on the right of peoples and individuals to international solidarity (A/HRC/26/34, annex). Given the substantial amount of information recorded, that report could not include a thorough analysis of concerns that had been repeatedly expressed during the regional consultations.

In the present report, the Independent Expert thus briefly examines four issues selected in the light of the weight of their implications for the final version of the draft declaration to be submitted to the Human Rights Council in June 2017. The discussion of the following issues is thus necessarily narrowed solely in the context of the proposed declaration: updating the preamble to amplify the legal framework for international solidarity; articulating the conceptualization and nature of the right to international solidarity; taking into account both economic, social and cultural rights and civil and political rights in the consideration of the extraterritorial obligations of States; and identifying which non-State actors are being addressed the proposed draft declaration, and elaborating their roles as required by the right to international solidarity.

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I. Introduction

1. The previous report of the Independent Expert on human rights and international solidarity, Virginia Dandan (A/HRC/32/43 and Corr.1), submitted to the Human Rights Council in June 2016 pursuant to Council resolution 26/6, was a summary of what had transpired during the regional consultations that she had convened on the subject of the proposed draft declaration on the right of peoples and individuals to international solidarity (A/HRC/26/34, annex). The purpose of the regional consultation series was to obtain as much input as possible from Member States and other stakeholders with a view to guiding the revision of the draft text by the Independent Expert. A final draft declaration will be presented to the Council in June 2017, at its thirty-fifth session.

2. The Independent Expert, with the assistance of the Office of the United Nations High Commissioner for Human Rights, convened regional consultations with representatives of the Western European and other States region and the Eastern European region in Geneva in April 2015; with representatives of the African region in Addis Ababa in July 2015; with representatives of the Latin American and Caribbean region in Panama City in September 2015; with representatives of the Asia-Pacific region in Suva in November 2015; and with representatives of the Middle East and wider Asia region in Doha in January 2016. The consultations brought together relevant experts and practitioners from Member States; intergovernmental organizations; United Nations agencies, including regional economic commissions; and civil society, including academic non-governmental organizations (NGOs). The series was designed to enable participants to discuss the text of the proposed draft declaration in terms of its logic, structure and content; provide concrete input with a view to clarifying issues seen as arising from the text; and put forward further recommendations for the implementation of the right to international solidarity on the ground.

3. The discussions among participants in the regional consultations generated a wealth of diverse views on topics including the understanding of a right to international solidarity; the perceived links between international solidarity and international cooperation; the role of international solidarity in addressing such issues as development, poverty and inequality, including gender inequality, at the national level and particularly in implementing the new Sustainable Development Goals; the role of international organizations in actively contributing to the promotion and application of international solidarity; and the role of non-State actors in actively promoting international solidarity as a tool for the fulfilment of human rights.

4. Participants provided input, including comments and recommendations of a general nature on the conceptualization of the proposed draft declaration and its structure, substance and organization, as well as more specific and detailed amendments to the text resulting from an article-by-article review. In the light of the substantial amount of information recorded, the previous report of the Independent Expert could include only the highlights of the major issues that had arisen from the regional consultations. However, in her presentation of the report at the thirty-second session of the Human Rights Council, the Independent Expert clarified that all inputs, regardless of whether they were highlighted in the report, would be considered and analysed as she carried out the process of modifying the text of the proposed draft declaration. She also pointed out that the recurring concerns that had emerged from the consultations would be discussed in a subsequent report.

5. A number of concerns were repeatedly expressed and discussed during the regional consultations but could not be analysed thoroughly in the previous report. In the present report, the Independent Expert examines the following four points on the basis of their significance to the eventual revision of the proposed draft declaration into its final form:

(a) Additional and updated legal references, in particular those on customary international law, should be reviewed in order to strengthen the preamble of the draft text and further develop a well-founded legal framework for the right to international solidarity;

(b) Clarification is necessary as to whether the right to international solidarity should be understood as a claimable right or as a principle with moral force and whether it is a right to benefit from, or a right to demand, the application of the principle of international solidarity. In that context, it was suggested that mechanisms of enforcement for such a right be outlined, inter alia, by developing guidelines in which the roles of various stakeholders would be defined and clear examples laid out of actions to enforce a right to international solidarity;

(c) There were concerns with regard to the references to "non-State actors", which should be more specific, as the terminology has been loosely applied to a wide range of actors, including business entities, and NGOs as well as armed groups and terrorist organizations. It is therefore necessary that relevant non-State actors, including transnational corporations and NGOs, be explicitly referred to in the draft declaration, together with clearly articulated roles and obligations;

(d) A greater emphasis on extraterritorial obligations of States would strengthen the added value of the draft declaration. In that context, it is necessary to extend extraterritorial obligations to cover the areas of economic, social and cultural rights and civil and political rights as well as human rights in climate and environmental issues.

6. The arguments presented below were extracted from the varied views expressed, including those emanating from relevant United Nations documents, scholarly publications and the Independent Expert's own first-hand experience working on human rights in terms of both theory and practice. The Independent Expert reiterates that the issues considered in the present report are examined using the proposed draft declaration as a point of departure. Consequently, while research on those issues involved the examination of all their aspects, the report addresses only the essential points to be considered in the process of improving and refining the text of the proposed draft declaration as it stands.

II. Key issues emerging from the regional consultations

A. A legal framework for international solidarity: deriving the right to international solidarity from the sources of international law

Background

7. The Statute of the International Court of Justice, in its article 38, identifies four sources of international law: treaties between States; customary international law derived from the practice of States; general principles of law recognized by

civilized nations; and, as a subsidiary means for the determination of rules of international law, judicial decisions and the writings of "the most highly qualified publicists".[1] That list has often been criticized as no longer complete. The resolutions of the General Assembly, although not legally binding, have an important effect in the process of law-making. They are based on the positions taken by States, reflecting their acceptance and practice, thus embodying a rule of international law as part of the development of customary international law. Some resolutions are part of the treaty-making process, with the treaty text having to be negotiated within the framework of the United Nations among States members of the Assembly. Given the importance of Assembly resolutions in shaping international law, they have become part of the above-mentioned list.[2] This is the context in which to start a brief discussion of customary international law, which, in the view of the participants in the regional consultations, is an important source for a legal framework for international solidarity.

8. Customary international law results from a general and consistent practice of States followed by them out of a sense of obligation.[3] Variations in the formulation of what might be considered a definition of such law recognize the existence of two elements — the practice of States (custom) and their belief in the obligation to follow that practice (*opinio juris*) — that are present in customary law.[4] In determining what constitutes a "consistent practice of States", we could consider the behaviour of States in their diplomatic relations and the official policy statements made in that regard. It may be more difficult, however, to ascertain whether a State is acting out of a sense of obligation or out of courtesy or habit. One of the ways to determine this is to examine the State's acts or omissions in similar situations. Here, it is worth considering the suggestion that, for a practice to be considered customary international law, it does not have to be universally followed, but must nevertheless have obtained widespread acceptance.[5] It is also worth taking into account the notion that international custom is described as unconscious and unintentional law-making and does not arise from a deliberate legislative process.[6] In any case, the definition as formulated in this paragraph suffices for the specific purpose of this section, in which the question of customary international law will guide the discussion in the context of the proposed draft declaration, particularly the text of its preamble, which sets out the legal framework for the right to international solidarity.

9. The framework for international solidarity is derived from three general sources: the Charter of the United Nations; the Universal Declaration of Human Rights and the international human rights treaties; and the multitude of commitments relating to human rights and development that have been adopted by States at United Nations international conferences and summits and in General Assembly resolutions. In previous reports, the Independent Expert began her

[1] See Greenwood, C., "Sources of international law: an introduction", available at www.legal.un.org/avi.

[2] Ibid.

[3] See Sahl, S., "Researching customary international law, State practice and the pronouncements of States regarding international law", available at www.nyulawglobal.org/globalex/Customary_International _Law.html.

[4] Ibid.

[5] See "Customary international law", in *International Judicial Monitor*, vol. 1, No. 5 (December 2006); available at www.judicialmonitor.org.

[6] See Da Rocha Ferreira, A., "Formation and evidence of customary international law", Federal University of Rio Grande do Sul (2013), p. 186; available at https://www.ufrgs.br.

exploration and review of applicable human rights frameworks from which a right to international solidarity could be derived. She reiterates here that the intention of the proposed declaration on the right of peoples and individuals to international solidarity is not to create new norms and obligations, but to signify existing obligations with a view to fostering implementation and accountability with regard to the fulfilment of human rights. In response to comments emerging from the regional consultations to further support the legitimacy of a right to international solidarity, the Independent Expert highlights below internationally recognized legal provisions that are directly linked to the principle of international solidarity.

10. The Independent Expert recalls that, in an earlier report to the General Assembly, of 12 August 2015 (A/70/316), she presented what she called the international normative bases of the principle of international solidarity. She identified them as the Charter of the United Nations, the Universal Declaration of Human Rights and the international human rights treaties that enshrine economic, social and cultural rights and civil and political rights, stressing the specific treaty provisions directly linked to the duty of international cooperation, a constituent element of international solidarity.

11. In addition, the Independent Expert highlighted selected United Nations declarations in the field of human rights and development, referring to them as evidence of the overwhelming manifestation of international solidarity among States in the multitude of commitments and promises relating to human rights and development, and briefly discussed a few of them,[7] in particular the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations; the 1986 Declaration on the Right to Development; and the 1993 Vienna Declaration and Programme of Action.

12. The report also contained a discussion of applicable regional-level frameworks, taking into account a number of regional treaties that integrate the principle of solidarity into their official documents and reaffirm respect for and the protection and fulfilment of human rights.[8] Among them are the Constitutive Act of the African Union, adopted in 2000; the Arab Charter on Human Rights, adopted in 2004; the Charter of the Association of Southeast Asian Nations, adopted in 2007; the Charter of Fundamental Rights of the European Union, which was proclaimed in 2000 and entered into force with the Treaty of Lisbon in 2009; and the Charter of the Organization of American States, adopted in 1948.

13. In the present report, the Independent Expert endeavours to update the legal framework for international solidarity in line with more recent developments in the field of human rights and international solidarity. She emphasizes that, in the process of improving the proposed draft declaration, all materials from research studies and other inputs from various sources, including forums and consultations, will be consolidated, analysed and taken into consideration.

International cooperation as a duty of States

14. Although a complete listing and examination of all relevant declarations of the United Nations is beyond the scope of the present report, the Independent Expert

[7] See A/70/316, paras. 15-19.

[8] Ibid., para. 20 (a)-(c).

reiterates and reaffirms the provisions of Articles 55 and 56 of the Charter of the United Nations, noting that in order to achieve the purposes of the United Nations as set out in the Charter, there is a need for cooperation among States. The 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations (General Assembly resolution 2625 (XXV), annex) goes further. It stresses that States have "the duty to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences". The Declaration also affirms that "States shall cooperate in the promotion of universal respect for, and observance of, human rights and fundamental freedoms for all, and in the elimination of all forms of racial discrimination and all forms of religious intolerance". The Independent Expert reiterates that international cooperation is the instrument through which international solidarity is upheld and realized, as discussed in detail in her earlier report referred to above.[9]

The imperative of international solidarity to address global challenges

15. Following the United Nations Conference on Sustainable Development, held in 2012, the General Assembly adopted the outcome document of the Conference, entitled "The future we want" (resolution 66/288 (2012), annex), in which States, in its paragraph 11, reaffirmed their commitment to strengthen international cooperation to address the persistent challenges related to sustainable development for all, in particular in developing countries. In paragraph 260, States stressed that South-South cooperation should be seen as an expression of solidarity and cooperation between countries, based on their shared experiences and objectives. The document is a veritable and comprehensive road map outlining the collective commitment of States to take action towards sustainable development.

16. "The future we want" contains a long list of aspirations, including in relation to climate change. In effect, it establishes the inextricable link between the environment, the advancement of sustainable development and the fostering of international cooperation and solidarity. In particular, in its paragraph 18, States expressed their determination to reinvigorate political will and to raise the level of commitment by the international community to move the sustainable development agenda forward, through the achievement of the internationally agreed development goals; further reaffirmed their respective commitments to other relevant internationally agreed goals in the economic, social and environmental fields since 1992; and therefore resolved to take concrete measures that accelerate implementation of sustainable development commitments. Three years later, in 2015, the outcome document of the United Nations summit for the adoption of the post-2015 development agenda, entitled "Transforming our world: the 2030 Agenda for Sustainable Development" (General Assembly resolution 70/1), was adopted, its centrepiece being the Sustainable Development Goals, the successors to the Millennium Development Goals, which had expired at the end of 2015.

[9] Ibid., paras. 34-53.

17. The preamble to the 2030 Agenda for Sustainable Development declares the strong commitment that all countries and all stakeholders, acting in collaborative partnership, will implement the plan and embark on a collective journey, pledging that no one will be left behind. Sustainable Development Goal 17 reflects the importance of strengthening the spirit of global solidarity in implementing the Agenda through a revitalized global partnership for development. Similarly, in the outcome document of the third International Conference on Small Island Developing States, entitled "SIDS Accelerated Modalities of Action (SAMOA) Pathway" (General Assembly resolution 69/15 (2014), annex), although States reasserted that the well-being of small island developing States and their peoples depended first and foremost on national actions, they also recognized that there was an urgent need to strengthen cooperation and enable strong, genuine and durable partnerships at the subnational, national, subregional, regional and international levels to address the unique and particular vulnerabilities of small island developing States so as to ensure their sustainable development. In addition, States reaffirmed that small island developing States were equal partners and that empowered, genuine and durable partnerships were based on mutual collaboration and ownership, trust, alignment, harmonization, respect, results orientation, accountability and transparency and that political will was required to undertake and implement long-term, predictable commitments.[10]

18. Solidarity across national boundaries and generations is underlined in the United Nations Framework Convention on Climate Change. Article 3 of the Convention requires that States Parties protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities, with developed countries called upon to take the lead in combating climate change and its adverse effects. This spells out a collective responsibility of all States to safeguard the collective good and to act in solidarity by asking those countries with the most capacity to take on the obligation of actively addressing the common challenges to which they contributed the most, in the spirit of the duty of international cooperation among States.

19. In the outcome document of the twenty-first session of the Conference of the Parties to the United Nations Framework Convention on Climate Change, known as the Paris Agreement, the Conference of the Parties recognized that climate change represented an urgent and potentially irreversible threat to human societies and the planet and thus required the widest possible cooperation by all countries, and their participation in an effective and appropriate international response, with a view to accelerating the reduction of global greenhouse gas emissions.[11] States parties acknowledged the importance of support for and international cooperation on adaptation efforts and the importance of taking into account the needs of developing country parties, especially those that were particularly vulnerable to the adverse effects of climate change.[12] Article 9 (3) of the Agreement stipulates that, as part of a global effort, developed country parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels. The wording of the Agreement implies the obligation to provide assistance to enable developing States parties, especially those most vulnerable, to achieve

[10] See resolution 69/15, annex, paras. 21 and 100.
[11] See FCCC/CP/2015/10/Add.1, decision 1/CP.21, annex.
[12] Ibid.

mitigation and adaptation, thus upholding the principle of a common but differentiated responsibility. Furthermore, the Agreement calls for a type of cooperation that is in line with the principle of partnership based on mutual respect, and acknowledges the importance of the participation of individuals, who should be the ultimate beneficiaries of such cooperation.

International solidarity in financing for development

20. Solidarity plays a seminal role in the framework of financing for development, as first highlighted in the 2002 Monterrey Consensus of the International Conference on Financing for Development and confirmed in the 2008 Doha Declaration on Financing for Development. The 2015 Addis Ababa Action Agenda of the Third International Conference on Financing for Development (General Assembly resolution 69/313, annex) reiterates the need to address such financing in the spirit of global partnership and solidarity.

21. The 2005 Paris Declaration on Aid Effectiveness and the 2008 Accra Agenda for Action (A/63/539, annex) underlined the need to build more effective and inclusive partnerships for development, aligning the strategies of donor countries with the priorities of partner countries and increasing accountability and the predictability of aid. They also underscored the need to enhance the accountability of both donor countries and partner countries to their respective citizens and parliaments for their development policies, strategies and performance.[13]

22. In 2011, the Fourth High-level Forum on Aid Effectiveness brought together, for the first time, Heads of State, ministers, representatives of developing and developed countries, heads of multilateral and bilateral institutions and representatives of various types of public, civil society, private, parliamentary, local and regional organizations in Busan, Republic of Korea. Together, they agreed on the outcome document of the Forum, the Busan Partnership for Effective Development Cooperation, which declared that they were united by a new partnership that was broader and more inclusive than ever before, founded on shared principles, common goals and differential commitments for effective international development. They committed to partner in taking action to facilitate, leverage and strengthen the impact of diverse sources of finance to support sustainable and inclusive development, including taxation and domestic resource mobilization, private investment, aid for trade, philanthropy, non-concessional public funding and climate change finance.[14] They also committed themselves to the establishment of a new, inclusive global partnership for effective development cooperation.

B. The nature of the right to international solidarity

23. The sceptical view has often been expressed that, although international solidarity is an important moral principle and a political commitment, it does not meet the requirements of a legal concept, much less a human rights concept. There is also underlying scepticism in the question of whether the right to international solidarity is to be understood as a claimable right or a right with moral force, and whether it is a right to benefit from international solidarity or a right to demand the

[13] See www.oecd.org/dac.

[14] Full text available at www.oecd.org.

application of the principle of international solidarity. That question stems from the definition of the right to international solidarity contained in the proposed draft declaration on the right of peoples and individuals to international solidarity, which states in its article 5:

> "The right to international solidarity shall be understood as a fundamental human right by which peoples and individuals have the freedom to enjoy, on the basis of equality and non-discrimination, the benefits of a harmonious international society with a just and fair international political and economic order, in which all human rights and fundamental freedoms may be fully realized."

Claiming the right to international solidarity

24. This section of the present report responds to the question referred to in paragraph 23 above and also touches upon other facets of international law pertaining to that question. The Independent Expert tends to agree with the idea that our understanding of a right is "always imperfect and incomplete"[15] and that the claimability of a right ultimately hinges on whether it can be meaningfully and validly claimed against others. This may very well be an essential characteristic of rights, although there are some who believe that claimability is valuable and important, but not necessary. The present report does not delve into this debate among legal academics, but stresses the well-recognized premise that if a right is to be claimable, there must be identifiable rights holders and duty bearers spelling out what demands it generates and who is bound by them.

25. The proposed draft declaration, in its article 6, enumerates the holders of the right to international solidarity and, in its article 7, what that right includes. Similarly, article 8 identifies the duty bearers and lays out their responsibilities in broad terms, while articles 9 to 12 set out more specific obligations. The Independent Expert reiterates that the obligations of States (the primary duty bearers) spelled out in the proposed draft declaration are already existing obligations under the various international human rights treaties. The value of the proposed draft declaration is that it articulates how those obligations are to be applied or implemented in accordance with the requirements of the specific provisions of human rights treaties as set out in the corresponding general comments and general recommendations of the treaty bodies. In that context, the right to international solidarity is a right to demand the implementation of international solidarity so that benefits can be derived from it. The Independent Expert's position is that the right to international solidarity is a claimable right by virtue of its relationship with international human rights law as described above.

26. There was a time when the International Covenant on Economic, Social and Cultural Rights was considered to be a set of mere moral aspirations, vaguely worded for the most part, with no indication of how those rights would be enforced. States ratified the treaty, arguably for strategic purposes. In due course, the Committee on Economic, Social and Cultural Rights — the treaty body mandated to monitor the compliance of States parties with their obligations under the Covenant — began its work of interpreting the provisions of the Covenant, seeking to clarify their meaning and identifying, inter alia, their normative content, the obligations of States and of other actors, and violations of the rights enshrined therein. Those interpretations of the

[15] See Etinson, A., "Human rights, claimability and the uses of abstraction", in *Utilitas*, vol. 25, No. 4 (2013); available at www.adametison.com.

Covenant are the general comments formulated and adopted by the Committee on the basis of its growing body of knowledge acquired through the periodic monitoring of reports of States parties and from United Nations specialized agencies working in the field, as well as from similar reports received from NGOs. The general comments constitute the "soft law" of the Committee, setting norms and standards in connection with treaty provisions and the issues emerging from them.

27. Such standards and norms did not exist when the Covenant first came into force decades ago. At that time, States themselves interpreted and decided how they should implement the rights set out in the Covenant. They adopted the appropriate legislation and put to work or created the institutions necessary to implement it. But even where there was an absence of such legislation, they developed policies, plans and administrative measures to implement the provisions of the Covenant. Anyone can access the existing records of the Committee on Economic, Social and Cultural Rights that document this narrative. In the interest of space and time, the Independent Expert can provide only an anecdotal account based on her experience as a former member of the Committee. She deems it necessary to place on record her views on this matter, owing to its value in justifying her position that our understanding of human rights cannot be perfect and complete from the very start, as exemplified by the international human rights treaties that were not enforceable even as they entered into force. Human rights can be realized as enforceable claims only through the continuous work and efforts of legal and political institutions as well as human rights mechanisms at the national, regional and international levels.

Role of the international community of States in the development of international law and international human rights law

28. Given the limitations on the length of the present report, it is not possible for the Independent Expert to look further into the principle of international solidarity than she has in her previous reports. However, she wishes to touch briefly on the subject of the dynamics of international society and international solidarity, which requires further exploration in the future because of its impact on the role of the right to international solidarity in the possibility of collective enforcement of common principles.[16] From the point of view of solidarism,[17] international society can be defined as what exists when a group of States, conscious of certain common interests and common values, form a society in the sense that they conceive themselves to be bound by a common set of rules in their relations with one another, and share in the working of common institutions.[18] The Independent Expert advances the view that the United Nations and its Charter are clearly illustrative in that regard, even while bearing in mind that there is disagreement among scholars regarding the normative differences between the terms "international society" and "international community". From the solidarist point of view, the common interests and values of States are wide in scope, extending beyond the mere coexistence of States to elevate the individual to a subject of international law. On the one hand, solidarism advances the idea of sustained cooperation on a wide range of issues, including the promotion, protection

[16] See Knudsen, T. B., "International society and international solidarity: recapturing the solidarist origins of the English school" (2000), p. 16; available at http://ecpr.esc/Filestore/PaperProposal/4d037102-75c3-494a-827a-018d7cddeeff.pdf.

[17] A school of thought within the English school of international relations theory.

[18] See Bull, H., *The Anarchical Society: A Study of Order in World Politics*, 2nd ed. (London, Macmillan, 1977), p. 13.

and implementation of human rights, human development and environmental protection. Moreover, it derives the rules of international law from actual agreement among States as indicated by their common practices and treaties.[19] On the other hand, the conventional pluralist approach sees the State as the only legitimate subject of international law and argues that the objective of States in international relations is to maintain relatively peaceful coexistence through the strict observation of the principles of sovereignty and non-intervention. That approach implies that compliance with certain rules and norms is motivated solely by the pursuit of survival and recognition, and it views international law as based on the universal laws of nature, discoverable through the common reason of man.[20]

29. The Independent Expert supports the argument that it is possible for standards of morality to enter the domain of international law and politics, thereby allowing for progressive change through extended interpretations as well as for amendments to international norms and rules. The aim is not to revolutionize existing international law, but to introduce elements of morally informed judgment in the application or development of the rules of international law. While this solidarist doctrine of natural law is confronted with the argument that the law cannot be based on something as disputable as morality and reason, an argument in its favour is that the validity of a legal argument is based not on the nature of its origins, but on how it is received by the international community upon its introduction. Therefore, principles derived from reason and morality may be translated into standard operating procedures, State practice and, ultimately, rules of positive international law and thus possibly gain international recognition that cannot be acquired otherwise.[21] The Independent Expert believes that the same procedure can be applied in developing the right to international solidarity as an enabling right for the realization, promotion and protection of human rights at large.

C. International solidarity and the extraterritorial obligations of States

In the area of economic, social and cultural rights

30. The compliance of States with their extraterritorial obligations has reached a critical stage in this era of globalization, particularly in the economic field, where State and non-State actors exert considerable influence on the realization of economic, social and cultural rights. The 2011 Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights clarify the parameters of the extraterritorial obligations of States and confirm the primacy of human rights among competing sources of international law. Despite the universality of human rights, many States interpret their human rights obligations as applicable only within their own borders.[22]

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[19] See Knudsen, T. B., "International society and international solidarity: recapturing the solidarist origins of the English school" (2000), p. 16; available at http://ecpr.esc/Filestore/PaperProposal/4d037102-75c3-494a-827a-018d7cddcefl.pdf.

[20] Ibid.

[21] Ibid. p. 24.

[22] See Extraterritorial Obligations Consortium, "Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (Heidelberg, Germany, 2012); available at www.etoconsortium.org.

31. The Maastricht Principles concern the obligations of States and other actors beyond borders. They point out the duty of international cooperation in general, with principles 19-40 being those with the greatest bearing on the proposed draft declaration. It is not the intention of the present report to dwell on those principles, as they are wide-ranging in scope, with clearly articulated prescriptions for implementation. Moreover, it would be superfluous to discuss the notion of extraterritoriality, as that term is an explicit reference to beyond-border issues that are, in this regard, connected to economic, social and cultural rights.

32. The Commentary to the Maastricht Principles examines in greater detail the complex issues behind the Principles that the drafters had to resolve before the text was finalized. The link between the Principles and international solidarity lies in international cooperation, which is one of the two components of international solidarity, the other being preventive solidarity.[23] The issue of international cooperation is arguably at the very core of the Maastricht Principles and therefore has a strong correlation to the proposed draft declaration. To provide just one example, a part of the Commentary reads, "International cooperation must be understood broadly to include the development of international rules to establish an enabling environment for the realization of human rights and the provision of financial or technical assistance. It also includes an obligation to refrain from nullifying or impairing human rights in other countries and to ensure that non-State actors whose conduct the State is in a position to influence are prohibited from impairing the enjoyment of such rights."[24] That statement raises three issues of direct relevance to the contents of the proposed draft declaration, while at the same time exemplifying the classic threefold typology of human rights obligations: to respect, to protect and to fulfil. Refraining from impairing human rights is the obligation to respect; prohibiting third parties from impairing the enjoyment of human rights is the obligation to protect; and establishing an enabling environment for the realization of human rights is the obligation to fulfil.

In the area of civil and political rights

33. A number of times during the regional consultations, it was urged that the references in the proposed draft declaration to the extraterritorial obligations of States encompass civil and political rights in addition to economic, social and cultural rights. Indeed, the Maastricht Principles, while focusing on the extraterritorial obligations of States in the area of economic, social and cultural rights, explicitly state, in principle 3, "All States have obligations to respect, protect and fulfil human rights, including civil, cultural, economic, political and social rights, both within their territories and extraterritorially."[25]

34. States' policies and actions have an impact on the enjoyment of human rights by individuals within and outside a State's territory. Extraterritorial impacts on civil

[23] For a discussion on preventive solidarity and international cooperation as the two components of international solidarity, see A/70/316, paras. 23-53.

[24] See De Schutter, O, A. Eide, A. Khalfan, M. Orellana, M. Salomon and J. Seiderman, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights", in *Human Rights Quarterly*, vol. 34 (Johns Hopkins University Press, 2012), p.1104.

[25] See Extraterritorial Obligations Consortium, "Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (Heidelberg, Germany, 2012), I.3.

and political rights, for example, can be observed in the conduct of warfare, territorial occupation and other military actions, migration policies, sanctions and coercive measures, extraordinary rendition, drone strikes and the operation of extraterritorial detention and interrogation facilities for combatants, migrants and refugees.[26] In any case, the issue of the application of States' obligations in the extraterritorial extension of civil and political rights is contested and vague. States take varying positions on the matter, ranging from reluctant willingness to outright rejection.[27]

35. "Jurisdiction" is a contentious issue that adds to the complexity of the discussion. The Maastricht Principles tries to tackle the question of "scope of jurisdiction" in principle 9 and succeeds in identifying another layer of complexity with such issues as the State's effective control and the foreseeable effects of acts or omissions.[28] While some international human rights instruments attach a State's obligations to its jurisdiction, including the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the Convention against Torture, as well as such regional instruments as the European Convention on Human Rights and the American Convention on Human Rights,[29] they are silent regarding the scope of applicability of the State party's obligations.

36. The Commentary to the Maastricht Principles, under principle 9, defines the applicability of the International Covenant on Civil and Political Rights, citing existing case law in that respect in support of this definition. For that purpose, "the notion of jurisdiction refers to the relationship between the individual and the State in connection with a violation of human rights, wherever it occurred, so that acts of States that take place or produce effects outside the national territory may be deemed to fall under the jurisdiction of the State concerned".[30]

37. The Independent Expert is satisfied that the brief discussion above sufficiently establishes the possibility of extending the reference to the extraterritorial obligations of States to encompass civil and political rights in the context of the proposed draft declaration. Moreover, in certain situations, the obligations of States apply where their actions and control over a territory justify their responsibility towards affected individuals and groups, even beyond their jurisdiction. In that regard, it may be recalled that the 1992 Rio Declaration on Environment and Development, in its principle 13, requested States to cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction. The

[26] See Wilde, R., "The extraterritorial application of international human rights law on civil and political rights", in *Routledge Handbook of International Human Rights Law* (London and New York, Routledge, 2013), chap. 35, p. 635.

[27] Ibid., p. 636.

[28] See Extraterritorial Obligations Consortium, "Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights" (Heidelberg, Germany, 2012), II.9.

[29] See Wilde, R., "The extraterritorial application of international human rights law on civil and political rights", in *Routledge Handbook of International Human Rights Law* (London and New York, Routledge, 2013), chap. 35, pp. 637 and 638.

[30] See De Schutter, O, A. Eide, A. Khalfan, M. Orellana, M. Salomon and J. Seiderman, "Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights", in *Human Rights Quarterly*, vol. 34 (Johns Hopkins University Press, 2012), p. 1106.

Independent Expert will conduct further studies and examine other sources in order to support the legitimacy of referring to civil and political rights along with economic, social and cultural rights in the context of the proposed draft declaration. The application of the extraterritorial obligations of States in the two areas of rights will set the context for the consideration of climate and environmental issues.

D. Non-State actors and their role in international solidarity

38. Non-State actors are important players in international relations, including, in many cases, with regard to international law and human rights law. They participate in and exert an influence on legal interests and processes. Furthermore, they may have a direct, indirect, formal or informal impact on such legal processes as law-making, law enforcement and dispute settlement. The term "non-State actors" often includes civil society, religious groups, corporations, armed groups and terrorist groups.[31] In the context of the proposed draft declaration, in which the right to international solidarity involves international cooperation and partnerships, article 6 of the Cotonou Agreement[32] offers a more contextualized and appropriate definition of non-State actors, referring to the private sector, economic and social partners including trade union organizations, and civil society in all its forms according to national characteristics. While the same article recognizes both State (local, regional and national) and non-State actors as "actors of cooperation", it stipulates that "recognition by the parties of non-State actors shall depend on the extent to which they address the needs of the population, on their specific competencies and whether they are organized and managed democratically and transparently".[33] The Independent Expert is of the view that that stipulation serves to exclude non-State actors such as armed groups, terrorists and other possible actors whose intentions do not conform to the purposes of cooperation and whose activities are contrary to the concept of democracy and the principle of transparency. Some statements and practices imply that non-State actors have human rights obligations, but these are rarely explicit and are not uniform. To dispel any doubts about human rights obligations, the preamble to the Universal Declaration of Human Rights[34] provides clear standards in that regard.

39. The Independent Expert draws attention to the Cotonou Agreement because of its relevance to the proposed draft declaration, in particular article 8 of the latter, which identifies the duty bearers of the right to international solidarity as "primarily States and non-State actors that work with peoples and individuals and, as such, also bear responsibilities, many of which may be similar and complementary to the duties of States". The article also lays out in broad terms the obligations of States with respect to the human rights treaties that they have ratified. Similarly, it is pointed out that non-State actors shall abide by their ethical responsibilities and codes of conduct and shall respect the right of peoples and individuals to international solidarity. The phrase "as such" reinforces the idea that, in the context of the proposed draft declaration, non-State entities bear duties relating to the right

[31] See Clapham, A., "Non-State actors"; available at http://ssrn.com/abstract=1339810.

[32] Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou in 2000 and revised in 2010, available at www.europarl.europa.eu.

[33] Ibid., art. 6.

[34] Available at www.ohchr.org.

to international solidarity when they work with peoples and individuals. The intention in the formulation of the proposed draft declaration was to considerably narrow the scope of the term "non-State actors" to NGOs that work with communities. However, in the light of the concerns that were raised repeatedly in all of the regional consultations, the roles and the obligations of private business enterprises, including transnational corporations, in the context of the proposed draft declaration are discussed below.

Non-governmental organizations

40. It is difficult to determine how many NGOs are operating in the world today, as there are no reliable statistics in that regard. In any case, the acronym "NGO" has become a familiar term in many languages. Available sources confirm the observation of the Independent Expert that NGOs tend to be best known for undertaking two types of activities: delivering basic services to people who need them and organizing activities to advocate change. They are also active in a wide range of more specialized roles such as assisting in emergency responses during calamities, including extreme weather events, and conducting information campaigns related to public health. In brief, NGOs play different roles in different country contexts. That makes it difficult to make general statements about them. In terms of structure, NGOs may be large or small, formal or informal, local or national, regional or international. Many are externally funded, while others depend on locally mobilized resources.

41. A more common-sense definition of NGOs is focused on those concerned with the promotion of social, political or economic change, an agenda usually associated with the concept of development.[35] This reinforces the idea that NGOs are engaged primarily in work at the local, national and international levels in diverse fields such as health care, microfinance, emergency relief and human rights. In fact, the service delivery work of NGOs has been increasing largely because of donor and government contracts in exchange for funding for such services and related specific tasks, including responding to natural disasters.[36] With the improvements in communications, more locally based groups, referred to as grass-roots organizations or community-based organizations, have also become active at the national level and even the global level through the coalitions that they form through networking.[37] In addition to delivering services, many development NGOs are concerned with advocating changes in policy at the national and international levels. Coalitions and caucuses play a prominent role in transnational networks engaged in advocacy in the areas of human rights, the environment and addressing violence against women.[38]

42. The collective phenomenon of thousands of motivated, well-intentioned NGOs providing public goods in most parts of the world, especially in developing countries, can be a glowing testimony to their increasing popularity. Yet the strengths of NGOs, including their exemplary service to the poor in developing

[35] See Lewis, D., and N. Kanji, "Non-governmental organizations and development", in *Routledge Perspectives on Development* (London and New York, Routledge, 2009), p.7.

[36] Ibid., p.13.

[37] See Willetts, P., "What is a non-governmental organization?" (2006), available at https://www.scribd.com.

[38] See Werker, E., and F. Z. Ahmed, "What do non-governmental organizations do?" (2007), p. , available at: www.hbswk.hbs.edu.

countries, can also produce corresponding weaknesses in their priorities, in terms of agenda-setting, decision-making or the manner in which they deliver their services to people in need.[39] Many NGOs have voluntary codes of conduct, which are obviously self-regulatory, but hardly any system for ensuring accountability, especially in the case of those working at the grass-roots level. This is the rationale for the provisions of article 8 of the proposed draft declaration, which, as noted above, identifies duty bearers and their obligations. In that article, it will indeed be important that the references to "non-State actors" be made more precise and specific, as suggested in numerous comments received by the Independent Expert.

Businesses enterprises and transnational corporations

43. Human rights law was designed to regulate the use of public power over those subject to such power. For that reason, it applies first and foremost to the State, as the holder of public power.[40] Conceptually, however, human rights obligations are almost unlimited in scope in terms of application. They are grounded in human dignity, which applies to all individuals, regardless of whether they are in a position to affect such obligations. The Universal Declaration of Human Rights, the foundation of international human rights law, which speaks of the entitlement of "everyone" to the rights it enumerates, does not identify those to whom such obligations apply. There is thus nothing in human rights theory that precludes the imposition of legal obligations on actors other than States. Indeed, States are hardly the only entities capable of infringing upon human dignity. Optimally, the protection of human rights should therefore extend to all situations in which these rights are threatened, regardless of who puts them in jeopardy.[41]

44. Business enterprises are recognized as powerful forces that can generate economic growth, reduce poverty and increase demand for the rule of law, thereby contributing to the realization of a broad spectrum of human rights.[42] But if they are to be optimal, businesses must operate within a regulated framework that includes rules, customs and institutions. Without an adequate regulatory framework, businesses can also be a source of serious human rights violations. Transnational corporations have both the economic power and the capacity to influence State authorities, especially those seeking investments, and to evade national controls as they operate transnationally. Accordingly, businesses can affect virtually all internationally recognized rights and, as economic actors, have unique responsibilities. If those responsibilities are intertwined with State obligations, it makes it almost impossible to tell who is responsible for what in practice.[43]

45. The Guiding Principles on Business and Human Rights stipulate that, although States have the primary duty to protect the rights of individuals under their jurisdiction by enacting and implementing effective laws and regulations to prevent and address human rights violations committed by businesses, and to guarantee access to effective remedies, businesses have a direct differentiated but complimentary responsibility in the area of human rights. The Guiding Principles

[39] Ibid., p. 17.

[40] See Ronen, Y., "Human rights obligations of non-State actors", in *Cornell International Law Journal*, vol. 46, No. 1, art. 2 (2013), p. 22; available at http://scholarship.law.cornell.edu/cilj/vol46/iss1/2.

[41] Ibid., p. 21.

[42] See A/HRC/8/5, para. 2.

[43] Ibid., para. 6.

outline three key elements: the State duty to protect against human rights abuses by third parties, including businesses; the corporate responsibility to respect human rights; and the need for more effective access to remedies. Regardless of their size, industry and place of operation, business enterprises have the responsibility to respect human rights. Therefore, companies must be aware of their actual or potential impacts, prevent and mitigate abuses and address the adverse impacts of their operations.[44] Guiding principle 10 (c) stipulates that States, when acting as members of multilateral institutions that deal with business-related issues, should draw on the Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

46. In relation to transnational business operations, international solidarity is closely linked to corporate social responsibility. Businesses, including their outsourcing partners, must identify and address the human rights impacts of their products and operations throughout the supply chain. Appropriate resources should be allocated to mitigating the negative externalities of their operations, and information on those impacts should be shared with concerned groups and populations. Collective action through multilateral institutions can help States to level the playing field in terms of ensuring that business enterprises respect human rights. Cooperation among States, multilateral institutions and other stakeholders can play an important role in that regard.[45]

47. In addition to refraining from taking advantage of vulnerabilities in the places where they conduct their operations, assessing their human rights impacts, providing remedies and mitigating their negative externalities, business enterprises and transnational corporations can undertake other commitments or activities to support and promote human rights, which may contribute to the enjoyment of such rights in the communities in which they operate. They may also voluntarily undertake additional human rights commitments through the promotion of particular rights, for philanthropic reasons or to protect and enhance their reputation and image and develop new business opportunities. As documented in the 2012 publication of the Office of the United Nations High Commissioner for Human Rights *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide*, in some cases national laws and regulations may require that enterprises carry out additional activities to promote human rights. For example, enterprises may identify a need to make social investments, such as in local health care or education, to achieve or maintain support in the surrounding communities for its operations. Supporting human rights also forms part of the commitment undertaken by signatories to the United Nations Global Compact,[46] whose main objective is to create a sustainable and inclusive global economy that delivers lasting benefits to people, communities and markets. That initiative promotes a principled approach to conducting business through the observation of fundamental responsibilities in the areas of human rights, labour, environment and anti-corruption, regardless of the location of the operation.

[44] See A/HRC/17/31, annex.

[45] Ibid.

[46] See *The Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (Office of the United Nations High Commissioner for Human Rights, 2012), p. 14.

48. Conflicting opinions persist as to whether, in particular situations, enterprises may have responsibility that extends beyond respect for human rights and includes seeking to promote them. Although the Guiding Principles focus on the responsibility to respect human rights, it is worth exploring to what extent businesses may have a responsibility to promote human rights by giving back to the communities that patronize those businesses. From an international solidarity perspective, businesses have a positive role to play in promoting sustainable global development by supporting the advancement of the societies in which they operate. The United Nations Global Compact works to ensure that business activity adds value to people's lives and communities and the planet by promoting the alignment of strategies and operations with universal principles of human rights, labour standards and a clean and healthy environment. Similarly, the proposed draft declaration provides an opportunity to delineate both the positive and negative obligations of business enterprises within the framework of their international cooperation and towards the communities, groups and individuals on whom their activities may have an impact.

III. Conclusion

49. **The foregoing discussion of selected issues that emerged from the five regional consultations has not come close to doing full justice to the wide range of relevant topics that need deeper analysis. Nonetheless, it has served the purpose of providing a brief introduction to certain elements in the proposed draft declaration that will be considered in the process of revising the existing text into its final form. The Independent Expert has attempted to avoid turning that discussion into a purely academic exercise, but it must be said that human rights discourse would not be legitimate without referring to the works of eminent scholars whose writings are, for the most part, legal treatises based on rigorous research in the interest of theory-building and -testing.**

50. **The Independent Expert came away from the five regional consultations with an even firmer conviction regarding the feasibility and enforceability of the right to international solidarity as elaborated in the proposed draft declaration. In addition, careful readings of available literature relevant to the issues discussed above serve to support the positions she has taken in that regard. Although it is not appropriate to discuss those positions in the present report, the Independent Expert wishes to reiterate the position she has taken since the beginning of her term as mandate holder: that the right to international solidarity is a claimable right, both feasible and enforceable. It is not surprising why some degree of scepticism persists in the light of certain factors that affect not only the proposed right to international solidarity, but also others known as "collective rights". For example, there may be no reliable and available means of enforcing compliance with the obligations generated by the right to international solidarity. In some cases, the courts may be unwilling or unable to adjudicate on that right.**

51. **The five regional consultations strongly attested to the fact that States already have the working institutions and agencies required for the implementation of the right to international solidarity. It thus appears that resistance to the proposed draft declaration arises from sources other than those working on the ground who apparently have the knowledge and**

experience to make it work in practice. The experiences related by national and regional actors are evidence that although it will take time to surmount certain obstacles, the right to international solidarity can be effectively implemented in culturally diverse ways that will not in any way diminish the standards contained in the proposed draft declaration. This shows that an understanding of human rights cannot exist before the rights themselves. Human rights are a work in progress and come into full light and existence as enforceable claims through the continuous development of their aspects through the hands-on work being done on the ground by local actors.

52. **The Independent Expert draws attention to paragraph 29 above in order to support her reaffirmation that the principle of international solidarity meets the requirements of a legal standard and can thus become a right when the community of States so decides.**